Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-475

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. RODNITE, and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Petitioners,

vs.

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HELEN K. HOBBS,
Assistant County Attorney
(Counsel of Record)
315 Court Street
Clearwater, Florida 34616
(813) 462-3354
Counsel for Respondents,
O. Sanford Jasper, Tax Collector,
Ronald J. Schultz, Property Appraiser

SUSAN H. CHURUTI,
County Attorney
(Counsel for Respondents)
Pinellas County, Florida 34616
(813) 462-3354

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW
(Restated)

I

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING THAT THE PETITIONERS' COMPLAINT WAS BARRED BY THE DOCTRINE OF COMITY AND THAT FEDERAL JURISDICTION SHOULD BE DECLINED.

LIST OF PARTIES IN THE COURT OF APPEALS, ELEVENTH CIRCUIT

The Respondent accepts the Petitioners' List of Parties but would point out that the class action status of the Rodnite complaint was never ruled upon as was not the question of class representation. Thus the Rodnites only *sought* to represent a class and *sought* to have these respondents declared representative of a class of defendants.

TABLE OF CONTENTS

Question Presented for Review I
List of Parties II
Statement of the Case (Restated in Part) 1
Reasons Why the Petition for Writ of Certiorari Should Be Denied 3

I. The Court of Appeals Correctly Affirmed the District Court's Finding That the Petitioner's Complaint Was Barred by the Doctrine of Comity and That Federal Jurisdiction Should Be Declined 3

TABLE OF AUTHORITIES

Cases

Bodie v. Connecticut, 401 U.S. 371 4

Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930) 5

Fair Assessment in Real Estate Association, Inc., et al. v. Gene McNary, et al., 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981) 3-4

Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973) 6, 7

Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973) 6

Lemon v. Kurtzman, 93 S.Ct. 1463 (1973), 411 U.S. 192, 36 L.Ed.2d 151 6

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 4

Neptune Hollywood Beach Club, Inc. v. Markham, 473 So.2d 691 (Fla. 4th DCA 1985) 2

Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982) 4, 5, 7

Salario v. Glaser, 461 A.2d 1100 (N.J. 1983) 6

Winicki v. Mallard, 615 F.Supp. 1244 (D.C. Fla. 1985) 7

Winicki v. Mallard, 783 F.2d 1567 (11th Cir. 1986) 4, 5

United States Constitution

Fourteenth Amendment 4

No. 87-475

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANDREW J. RODNITE, and ELLEN M. RODNITE, his wife, individually and on behalf of all others similarly situated,
Petitioners,

vs.

D. ROBERT GRAHAM, as Governor of the State of Florida, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE
(Restated in part)

Except for those statements which lapse into argument (which statements Respondent is certain this Court will recognize for what they are) the Respondent does not take issue with the Petitioner's Statement of the Case—except as follows.

On page 5 the Petitioner states Florida has two periods of limitations governing challenges to taxes and for any refund of taxes mistakenly paid or wrongfully extracted.

Respondent would point out that rather than two, there are three periods of limitations in Florida:

1) Section 194.171(2), Fla. Stat. (1985) provides a court suit challenging a tax assessment may be filed by any disgruntled taxpayer within 60 days of the date the tax roll is certified. The 60 day limit is jurisdictional.

2) Florida case law provides that a constitutional challenge to a taxing statute can be mounted at any time. *Neptune Hollywood Beach Club, Inc. v. Markham*, 473 So.2d 691 (Fla. 4th DCA 1985).

3) An administrative claim for a refund of taxes can be made under the provisions of Section 197.0138 (now 197.182 eff. 1985), Fla. Stat., at any time not exceeding four years from January 1 of the tax year in which the taxes were paid.

This is the "4 year period of limitations" to which the Rodnites repeatedly refer in their Petition.

In 1982 the statute provided in pertinent part:

197.0138 DEPARTMENT OF REVENUE TO PASS UPON AND ORDER REFUNDS.

(1)(a) Except as provided in paragraph (b), the department shall pass upon and order refunds when payment of taxes assessed on the county tax rolls has been made voluntarily or involuntarily under the following circumstances:

1. Any overpayment . . . .

4.

(b) Those refunds which have been ordered by a court or those refunds which do not result

from changes in the assessed value on a tax roll certified to the tax collector shall be made directly by the tax collector without order from the department.

(c) Claims for refunds shall be made in accordance with the rules of the department. No refund shall be granted unless claim is made within 4 years of January 1 of the tax year in which the taxes were paid. . . .

Section 197.0138(1)-4(b)(c), Fla. Stat. (1985).

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

The Court of Appeals Correctly Affirmed the District Court's Finding That the Petitioner's Complaint Was Barred by the Doctrine of Comity and That Federal Jurisdiction Should Be Declined

Since the Rodnite complaint involved a state tax refund question and since it was brought pursuant to 42 U.S.C. 1983, the Courts below quite properly considered whether the complaint was barred by the doctrine of comity. Where a Section 1983 action is grounded in an allegation of an unconstitutional tax scheme, to survive dismissal the plaintiff must demonstrate that there is no plain, adequate, and complete state remedy available. The initial burden, then, is upon the plaintiff to make such a showing. Unless he is able to do so, the federal courts may properly refuse to entertain his Section 1983 action. *Fair Assessment in Real Estate Asso-*

ciation, Inc., et al. v. Gene McNary, et al., 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981), p. 186.

The test of whether an adequate state remedy was available within the meaning of the doctrine of comity is not determined by reference to the time at which a given plaintiff decides to seek such a remedy.

Rather the Fourteenth Amendment requires:

> "'an opportunity . . . granted at a meaningful time and in a meaningful manner' . . ., for [a] hearing appropriate to the nature of the case," *Bodie v. Connecticut*, 401 U.S. 371, 378, as cited in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

The District Court Judge in the *Winicki v. Mallard* case (which dealt with the same issues as the Rodnite complaint) reviewed remedies available to Florida taxpayers and concluded they were adequate and complete to protect any federal constitutional rights involved. The court concluded that by the very rendering of the *Osterndorf* decision the Supreme Court of Florida demonstrated the availability of such remedies. *Winicki v. Mallard*, 615 F.Supp. 1244 (D.C. Fla. 1985), p. 1249. *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982).

The Appellate Court in affirming the *Winicki* District Court decision noted:

> The damages sought here are a refund of taxes collected under a state statute prior to its invalidation. Even though a state statute has been declared unconstitutional and is no longer operational, the principles of federalism upon which the comity doctrine rests require federal courts to show restraint where retroactive relief is being sought.[1]

> The district court appropriately refused to engage in a post hoc evaluation of Florida's resolution of the controversial tax statute, recognizing that the proper relation of the federal forum to that of the state in this most critical area of state operations is governed by the principle of comity.[2] *Winicki v. Mallard*, 783 F.2d 1567 (11th Cir. 1986), p. 1571.

Petitioners urge this court to ignore comity and launch the post hoc evaluation referred to above.

Rodnites complain that except for the non-retroactive application of the *Osterndorf* decision to the mass of taxpayers in which they were included they would have had the benefit of the Florida four year administrative time limitation in which to seek a refund for "overpayment."

Rodnites assert they are in the same position as was the *Brinkerhoff Trust Company* when the Missouri Supreme Court struck down a state taxing statute, ruled that the Trust Company *was* entitled to a refund and then found any recovery was barred by a statute of limitation. There is, however, a significant distinction between *Osterndorf* and *Brinkerhoff* that obviates the necessity of considering whether the two cases are in apposition as alleged by Petitioners. In *Brinkerhoff*, the Missouri Supreme Court ruled The Trust Company *was* entitled to a refund whereas in *Osterndorf* the Florida Supreme Court ruled the Rodnites *were not* entitled to a refund. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982).

The Supreme Court of Florida has, as have appellate courts of other states, regarded itself as being empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective

application if considerations of fairness and justice, related to reasonable surprise called for such treatment. *Gulesian v. Dade County School Board,* 281 So.2d 325 (Fla. 1973), *Interlachen Lakes Estates, Inc. v. Snyder,* 304 So.2d 433 (Fla. 1973), *Salario v. Glaser,* 461 A.2d 1100 (N.J. 1983).

In dealing with the question of retroactivity Chief Justice Burger in this court's decision in the case of *Lemon v. Kurtzman* stated at page 1468—

> [2] The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal . . . ." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940). Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'" *Linkletter, supra,* 381 U.S., at 627, 85 S.Ct., at 1736, quoting from *Chicot County Drainage Dist., supra,* 308 U.S., at 374, 60 S.Ct., at 319. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity. . . .

Further on at page 1169, Justice Burger further observed—

> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests may have constitutional roots." *Lemon v. Kurtzman*, 93 S.Ct. 1463 (1973), 411 U.S. 192, 36 L.Ed.2d 151.

Once the Florida *Osterndorf* court had reached the conclusion the taxing statute was unconstitutional, it was faced with the task of framing a decision which would deal with the scope of the application of its ruling and which took into consideration all the competing individual and public interests.

The Court found the statute had been administered by Florida public officials in good faith reliance on its validity. By referring to its prior decision in the *Gulesian v. Dade County School Board* case, the court impliedly recognized that a broad-brush, over-all retrospective application of *Osterndorf* would create a state-wide administrative and fiscal nightmare involving some 300,000 individual taxpayers, 67 counties and their attendant fiscal operations as well as the return of some $300,000,000.00 (three hundred million dollars), all of which had already been spent or was budgeted. *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982).

As Judge Moore pointed out in the District Court's decision in *Winicki v. Mallard*,

> "A more chilling effect upon the fiscal operation of state government cannot be imagined." *Winicki v. Mallard*, 615 F.Supp. 1244, p. 1248 (D.C. Fla. 1985).

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

HELEN K. HOBBS,
Assistant County Attorney
(Counsel of Record)
315 Court Street
Clearwater, Florida 34616
(813) 462-3354
Counsel for Respondents,
O. Sanford Jasper, Tax Collector,
Ronald J. Schultz, Property Appraiser

SUSAN H. CHURUTI,
County Attorney
(Counsel for Respondents)
Pinellas County, Florida 34616
(813) 462-3354